Supreme Court, U. S.
FILED
AUG 2 1979
MICHAEL RODAK, JR., CLERK

No. 78-1453

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, ET AL., PETITIONERS

v.

HARVEY F. EUGE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONERS

LAWRENCE G. WALLACE
Acting Solicitor General

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT E. LINDSAY
CARLETON D. POWELL
DANIEL F. ROSS
Attorneys
Department of Justice
Washington, D.C. 20530

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OPINIONS BELOW

The order of the district court (Pet. App. A 1a-3a) is not reported. The opinion of the court of appeals (Pet. App. B 4a-9a) is reported at 587 F.2d 25.

JURISDICTION

The judgment of the court of appeals (Pet. App. C 10a-11a) was entered on November 22, 1978. On

February 8, 1979, Mr. Justice Blackmun entered an order extending the time within which to file a petition for a writ of certiorari to and including March 22, 1979. The petition for a writ of certiorari was filed on March 19, 1979, and was granted on May 14, 1979 (A. 7, 40). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Internal Revenue Service has statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of an administrative investigation to determine his correct tax liability.

STATUTES INVOLVED

The pertinent provisions of Sections 7601, 7602 and 7604 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, 1a-2a.

STATEMENT

1. In October 1977, Special Agent Patrick J. Finnessey of the Intelligence Division of the Internal Revenue Service was assigned, together with a revenue agent, to investigate respondent's income tax liabilities for 1973-1976. The case had been referred to him by the Audit and Collection Division of the Internal Revenue Service after a search revealed that respondent had neither filed nor sought any extension to file a tax return for any of the years in question (A. 22-23). The Service had initially determined that respondent's primary source of income was from fees for preparing tax returns (A. 23). In connection with this activity, respondent had placed an advertisement in the classified telephone directory which read: "Euge, Harvey, F., get 'em back money tax man, prepared in your home, appointment only. Tax review and rework makes you money" (A. 23).

In order to determine respondent's correct tax liability for the years under examination, the agents sought to employ the bank deposits method of reconstructing his income. Under this well-established method of indirect proof, the Internal Revenue Service scrutinizes bank deposits to determine whether they represent taxable income and subtracts any non-income items. The agent's investigation disclosed that there were only two bank accounts in respondent's name. However, during his investigation, Special Agent Finnessey became aware that statements of 20 other bank accounts were sent to post office boxes in respondent's name, that the signature cards of these accounts listed addresses of properties owned by respondent, and that there were frequent transfers of funds between these accounts. These facts suggested to the agent that respondent maintained other bank accounts under aliases in order to conceal his taxable income (A. 24-25). For 1975 and 1976, the deposits in these other bank accounts were approximately $50,000 and $30,000, respectively (A. 25).

As a result of these disclosures, Agent Finnessey issued a summons to respondent on October 7, 1977,

requiring him to appear and complete a standard Internal Revenue Service handwriting exemplar form and to execute exemplars of the various signatures on the bank signature cards. After receipt of this data, the Internal Revenue Service handwriting laboratory would be able to determine whether respondent had maintained bank accounts under assumed names (A. 26-27).[1] At the time Agent Finnessey served the summons, respondent told him that he would not comply with it (A. 11, 25-26; Pet. App. B 7a).

2. When respondent refused to appear in response to the summons, the United States and Agent Finnessey commenced this action under 26 U.S.C. 7604 (a) in the United States District Court for the Eastern District of Missouri to enforce the summons (Pet. App. B 7a-8a).[2] At an evidentiary hearing held by the district court, Agent Finnessey testified with respect to the purpose of the investigation, the relevancy to that inquiry of the information sought by

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[1] Agent Finnessey had ascertained that during a separate independent investigation, respondent had given the Postal Service Inspection Division a handwriting exemplar of one of his suggested aliases (A. 27-28).

[2] On January 13, 1978, respondent was personally served with an order to appear before the district court on February 6, 1978, to show cause why he should not be compelled to obey the summons. After respondent failed to appear before the district court, that court on February 6, 1978, issued an order of attachment for his arrest. On February 8, 1978, after respondent appeared before the court in the custody of Internal Revenue Service agents, the district court dissolved its order of attachment for arrest (A. 15-16).

the summons, and the administrative procedures taken by him to obtain voluntary compliance (Pet. App. A 1a-2a). The agent stated that "[w]e need [the handwriting] exemplars to match the signature cards for the accounts" (A. 26) so that the Internal Revenue Service could establish whether respondent was maintaining bank accounts under assumed names. At the request of the attorney for the government, the agent prepared a list of aliases for which he required handwriting exemplars in order to complete his investigation (A. 27). The agent further explained that exemplars of respondent's aliases were necessary for his investigation and that he had no means of obtaining them other than the summons procedure (A. 28-29). Finally, the agent testified that he had made no recommendation with respect to the possibility of criminal prosecution of respondent (A. 29).

The district court ordered the summons enforced. Specifically, it ordered respondent to complete the Treasury Department Handwriting Exemplars form to be submitted by Ageny Finnessey, and to provide 10 handwriting exemplars of eight different signatures (Pet. App. A 2a).

The court of appeals reversed (Pet. App. B 4a-9a). By a 7-1 en banc vote, it overruled its prior (divided) panel decision in *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975), which had analogized the power of the Service to compel the production of handwriting exemplars to the corresponding power of a federal grand jury. Since grand juries are em-

powered to compel witnesses to give handwriting exemplars, *Campbell* had held that "[t]he Commissioner's statutory authority to summon 'other data' under Title 26 U.S.C., § 7602(2), includes the authority to require the taxpayer to give exemplars of her handwriting" (*id.* at 607).

The en banc decision below reconsidered the question previously resolved in favor of the government in *Campbell*—whether Section 7602 authorizes the Internal Revenue Service to require a taxpayer to execute handwriting exemplars. After reviewing the conflicting authorities (Pet. App. B 8a-9a), the en banc court of appeals concluded that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (footnote omitted). The view of the dissent in *Campbell*, adopted by the court, was that the compelled execution of a handwriting exemplar is a search and seizure within the meaning of the Fourth Amendment and that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (524 F.2d at 609).

The dissenting judge in the instant case would have enforced the summons "for all of the reasons expressed in [the majority opinion in] *United States* v. *Campbell*, [*supra*]." (Pet. App. B 9a). That decision held that Sections 7601 and 7602 of the Code gave the Internal Rvenue Service a broad mandate to

investigate and audit persons who may be liable for taxes, and that production of handwriting exemplars was within the Service's statutory summons power. The *Campbell* decision observed that summoned parties had substantial protections against abuse because Congress provided that an internal revenue summons can be enforced only by the courts after an adversary proceeding (see 524 F.2d at 607-608).

SUMMARY OF ARGUMENT

A.

Two provisions of the Internal Revenue Code of 1954, both of which have their origin in the Revised Statutes, support and supplement the accurate and conscientious self-reporting upon which our tax collection system depends. Congress has, in Section 7601 of the Code, directed the Secretary of the Treasury or his delegate "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Thus, Section 7602(2) authorizes the Secretary or his delegate "[t]o summon the person liable for tax * * * or any other person * * * [he] may deem proper, to appear before * * * [him] * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *."

This case arises from the issuance of an Internal

Revenue summons in the course of an investigation of respondent who had not filed tax returns for several consecutive years. The Service attempted to reconstruct respondent's income in accordance with the well-established bank deposits method. During the course of the inquiry, the Service became aware of the existence of 20 bank accounts with substantial balances bearing names on the signature cards other than that of respondent but addresses of properties owned by respondent. These facts, coupled with frequent transfers between the accounts and the use of a post office box in respondent's name for the receipt of the bank statements, suggested that respondent was maintaining bank accounts in false names for the purpose of concealing taxable income. Hence, in order to ascertain whether respondent was in fact the true owner of the various bank accounts, the agent issued a summons requiring respondent to execute for laboratory analysis on the standard IRS handwriting exemplar form the various signatures on the bank account cards.

The decision of the court of appeals that the Internal Revenue Service has no statutory authority to issue a summons requiring a person to appear and execute handwriting exemplars in aid of a tax investigation would seriously undermine the Service's ability to insure that all federal taxes due are reported and paid. In addition to routine audits based on examination of filed tax returns, the Service must utilize other forms of scrutiny if sources of unreported income and its recipients are to be identified.

As this Court observed in a similar context in *United States* v. *Bisceglia*, 420 U.S. 141, 150 (1975), "[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks." Thus, the maintenance of an alias on a bank account has always suggested that the owner has not properly reported the deposits for federal tax purposes.

Bank accounts under aliases are but one area in which handwriting exemplar summonses are commonly issued. They have also been used to determine the identities of persons who file multiple tax returns claiming fraudulent refunds, persons who purchase money orders under false names, and persons who issue false invoices. Handwriting exemplars can likewise be used to establish the authorship of gambling records and ascertain the identity of persons who forge their spouse's signature to a joint tax return to take advantage of the lower joint rates. In sum, a summons for a handwriting exemplar is a vital investigative tool in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry.

B.

1. The court of appeals' ruling that the Secretary's summons power does not extend to requiring a person to appear and execute handwriting exemplars in aid of a tax investigation has no basis in the statutory text, structure or legislative history.

Pursuant to Sections 7801(a) and 7802 of the

Code, the Secretary of the Treasury, through his delegate the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. To this end, Section 6201(a) and 6301, respectively, provide that the Commissioner "is authorized and required to make the inquiries, determinations, and assessments of all taxes" and that he "shall collect the taxes imposed by the internal revenue laws."

Coupled with the statutory duty of the Internal Revenue Service in Section 7601 to inquire after and concerning all persons who may be liable for any internal revenue tax, this panoply of congressional directives necessarily indicates that the Treasury is authorized to issue a summons requiring a person to appear and execute handwriting exemplars. Production of such evidence is firmly grounded in each of the four broad statutory purposes for the issuance of summons: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax; or (4) collecting any such liability. The summons served upon respondent falls well within these statutory purposes. Respondent had not filed a return for any of the years under investigation; the Service's ascertainment of all of his bank accounts was critical to the inquiry.

The operative terms of Section 7602 speak of summoning persons "to appear before the Secretary * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may

be relevant or material to such inquiry." The compulsory process authority to require a person "to appear * * * and to give such testimony as may be relevant" reasonably carries with it the power to compel a witness to exhibit specific physical characteristics such as handwriting or voice exemplars. The decisions of this Court favoring a broad interpretation of compulsory process authority to produce full disclosure of all of the facts (*United States* v. *Nixon*, 418 U.S. 683, 709 (1974); *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972)) are in accord with Professor Wigmore's observation that "The testimonial duty * * * includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents. * * * It extends also to the *human body* and to *chattels* and *premises* possessed." 8 J. Wigmore, *Evidence*, § 2216 (8) (McNaughton rev. 1961) (emphasis in original). Hence, the execution of handwriting exemplars is an inherent element of the power to compel a witness to appear. Accord: *United States* v. *Rosinsky*, 547 F.2d 249, 252 (4th Cir. 1977).

2. While we believe that the statutory authority to compel appearance and non-privileged testimony encompasses non-privileged displays of physical characteristics such as the handwriting exemplars at issue here, the fact that Section 7602(2) authorizes the summoning of "books, papers, records, or *other data*" (emphasis added) lends further support to the proposition that the execution of handwriting exemplars is within the scope of the Service's compulsory process.

The handwriting exemplars at issue here fit within the common understanding of the phrase "other data" in this context as "information of any kind" since they will provide factual evidence that will either confirm or deny the inference that respondent maintained 20 bank accounts under assumed names. It has been held that similar statutory language—"other information" and "material" (28 U.S.C. 1826 (a))—is sufficiently broad to include handwriting exemplars. *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975).

The inclusion of handwriting exemplars within the phrase "other data" does not, as the Sixth Circuit concluded in *United States* v. *Brown*, 536 F.2d 117 (1976), offend the statutory construction doctrine of ejusdem generis. This Court has cautioned that the doctrine cannot be employed "to render general words meaningless;" it therefore has no application where the "specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate." *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Here, the genus of documentary evidence already in existence is exhausted by the phrase "books, papers, [and] records." There would have been no reason for Congress to have added the general term "other data" if it were merely confined to the class of "books, papers and records." Hence, the general phrase "other data" in Section 7602 necessarily connotes the

broad range of other information material to the investigation that is within the ability of the summoned party to produce.

Nor is there any basis for the Sixth Circuit's view in *Brown*, apparently adopted by the decision below (see Pet. App. B 9a n.3), that the Service's summons authority does not extend to material that has "to be created for the examination" (536 F.2d at 122). The power to summon persons to appear and give testimony reasonably includes requiring the production of information or explanatory material in response to specific questions even though such evidence may not previously have been reduced to written form. Accord: *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Berkowitz*, 488 F.2d 1235 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); and *United States* v. *Carter*, 489 F.2d 413 (5th Cir. 1973).

At all events, a handwriting exemplar is merely the exhibition of an "identifying physical characteristic" of the witness. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967). As such, it is always in existence; the only creation involved is its recordation in permanent form for purposes of further study. In this respect, it is analogous to the taking of fingerprints or a photograph of a person under investigation or the required display of his person before an eyewitness for purposes of identification. If such techniques are within the scope of the Service's summons

power, the handwriting exemplars are likewise subject to compelled execution.

3. In holding that the Internal Revenue Service has no statutory authority to issue a summons compelling the execution of handwriting exemplars, the court of appeals overruled its prior decision in *United States* v. *Campbell*, *supra*, and adopted the view expressed in the dissenting opinion in that case.

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court made clear in *United States* v. *Dionisio*, 410 U.S. 1 (1973), and *United States* v. *Mara*, 410 U.S. 19 (1973), a grand jury subpoena requiring appearance is not a "seizure" within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that are "constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted).

Given the analogy between the grand jury subpoena and the internal revenue summons most re-

cently reaffirmed by the Court in *United States* v. *Bisceglia*, *supra*, 420 U.S. at 147, there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell*, whose view was adopted by the decision below, stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *LaSalle National Bank*, 437 U.S. 298 (1978), for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool. The analogy between the grand jury subpoena and the internal revenue summons is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. The constitutional concerns evinced by the court below with respect to summoned production of handwriting exemplars are accordingly groundless.

4. The legislative history of the summons power offers further indication that Congress did not intend to exclude physical evidence such as handwriting exemplars from the scope of the summons authority or to limit enforcement to those cases where the evidence was "in existence" prior to the issuance of the summons. "Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress * * *." *United States* v. *Bisceglia, supra,* 420 U.S. at 150. The 1954 codification of the tax law included a combination of previously separate provisions authorizing the issuance of summonses with "no material change from existing law" intended. An examination of the authoritative predecessor provisions, some of which were originally enacted more than a century ago, demonstrates that the summons authority was cast in the broadest possible terms and that it was intended to extend to all constitutionally permissible information.

ARGUMENT

AN INTERNAL REVENUE SERVICE SUMMONS MAY PROPERLY BE USED TO REQUIRE A PERSON TO APPEAR AND EXECUTE HANDWRITING EXEMPLARS IN AID OF AN ADMINISTRATIVE INVESTIGATON TO DETERMINE HIS CORRECT TAX LIABILITY

A. The Type of Summons Issued in This Case Is Essential to Effective Federal Tax Enforcement

1. The question presented in this case is of great importance to the administration of the internal revenue laws. The Internal Revenue Service is organized to carry out the broad responsibilities of the Secre-

tary of the Treasury, as set forth in Section 7801 (a) of the Internal Revenue Code of 1954, to administer and enforce the internal revenue laws. See *United States* v. *LaSalle National Bank,* 437 U.S. 298, 308 (1978). Our tax collection system depends primarily upon honest self-reporting. However, in order to support and supplement accurate and conscientious self-reporting by all taxpayers, Congress has directed the Internal Revenue Service in Section 7601 of the Code "to proceed * * * and inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." As this Court observed in *Donaldson* v. *United States,* 400 U.S. 517, 523-524 (1971):

> The section thus flatly imposes upon the Secretary the duty to canvass and to inquire. This is an old statute. It has roots in the first of the modern general income tax acts, namely, the Tariff Act of October 3, 1913, § II, ¶ I, 38 Stat. 178, and prior to that, in § 3172, as amended, of the Revised Statutes of 1874.

In discharging this duty to canvass and to inquire, the Internal Revenue Service has been granted broad statutory powers to examine books and witnesses through the issuance of summonses. Specifically, Section 7602 (Appendix, *infra,* 1a-2a) authorizes the Secretary "[t]o examine any books, papers, records, or other data which may be relevant or material to such inquiry; * * * [and] [t]o summon * * * any person having possession, custody, or care of books of account * * * or any other person * * * to appear be-

fore the Secretary * * * at a time and place named in the summons and to produce such books, papers, records or other data, and to give such testimony, under oath, * * * as may be relevant or material to such inquiry; and * * * [t]o take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry." Such summonses are administratively issued, and the Internal Revenue Service can seek their enforcement in the federal courts. See Section 7402(b); see also Section 7604(a), Appendix, *infra*, 3a.

This Court has consistently recognized that effective, and therefore fair, administration of the tax laws requires that internal revenue agents not be fettered in their good faith use of the investigatory tools that Congress has provided them to determine the liability of taxpayers. In holding in *United States* v. *Bisceglia*, 420 U.S. 141 (1975), that the Internal Revenue Service has the statutory authority to issue a "John Doe" summons to a bank or other depository to discover the identity of a person who may be liable for unpaid taxes, the Court recognized the common understanding that concealment of tax evasion may involve the use of aliases and that the fundamental goal of law enforcement is to establish the identity of wrongdoers by linking particular persons with suspicious activities. As the Court stated, "[i]t would seem elementary that no meaningful investigation of such events could be conducted if the identity of the persons involved must first be ascertained, and that is not always an easy task. * * *

[I]f criminal activity is afoot the persons involved may well have used aliases or taken other measures to cover their tracks. Thus, if the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases" (*id.* at 150).

In upholding the Internal Revenue Service's power to determine the identity of persons who may be liable for taxes, the Court in *Bisceglia* relied in large measure upon the well-established analogy between the Commissioner's summons power and the authority of the grand jury to compel production of evidence. As the Court noted, "had respondent been brought before a grand jury under identical circumstances there can be little doubt that he would have been required to testify and produce records or be held in contempt" (*id.* at 147). In support of this proposition, the Court cited its earlier statement in *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950), quoted thereafter with approval in *United States* v. *Powell*, 379 U.S. 48, 57 (1964), that the subpoena power of federal enforcement agencies is "more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." The summons authority of the Internal Revenue Service to compel the production of evidence in either documentary or testimonial form is essentially identical to the broad

inquisitorial powers of the other federal enforcement agencies. "While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called into question." *United States* v. *Powell*, *supra*, 379 U.S. at 57 (footnote omitted).

Finally, the Court noted in *Bisceglia* (420 U.S. at 146) that Congress has afforded summoned parties substantial protection by providing that an internal revenue summons is not self-executing but can be enforced only by the courts. See Section 7604(a). Thus, before the Commissioner can compel the production of evidence or the appearance of a witness, the summoned party is entitled to an adversary proceeding to consider his objections to enforcement. At the hearing he "may challenge the summons on any appropriate ground." *Reisman* v. *Caplin*, 375 U.S. 440, 449 (1964). "It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation." *United States* v. *Powell*, *supra*, 379 U.S. at 58 (footnote omitted). After reviewing the pertinent authorities, the Court in *Bisceglia* concluded (420 U.S. at 146) that "[t]he cases show that the federal courts

have taken seriously their obligation to apply this standard to fit particular situations, either by refusing enforcement or narrowing the scope of the summons." [3] In sum, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned" (*United States* v. *Bisceglia*, *supra*, *id.* at 151).

2. Like *Bisceglia*, this case arises out of an action by the Internal Revenue Service to enforce a summons seeking to establish the identity of the person responsible for participating in various suspicious financial transactions. In *Bisceglia*, the Service issued a summons to a bank requesting it to provide information as to the identity of the depositor of a substantial amount of badly deteriorated currency. Such unusual currency transactions strongly suggested that the depositor may not have properly reported the receipt of the funds for federal tax purposes. Because the identity of the potential taxpayer was unknown, the summons was issued "[i]n the matter of the tax liability of John Doe." In upholding the enforcement of such a "John Doe" summons, this Court emphasized the facts that "tax evaders are not readily identifiable" (420 U.S. at 145) and that the Internal Revenue Service "has a legitimate

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[3] See, *e.g.*, *United States* v. *Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States* v. *Theodore*, 479 F.2d 749, 755 (4th Cir. 1973); *United States* v. *Pritchard*, 438 F.2d 969 (5th Cir. 1971); *United States* v. *Dauphin Deposit Trust Co.*, 385 F.2d 129 (3d Cir. 1967).

interest in large or unusual financial transactions. * * *" (*id.* at 149). The Court recognized that the process of identification is critical to effective enforcement of the tax laws, observing that "[I]f the Internal Revenue Service is unable to issue a summons to determine the identity of such persons, the broad inquiry authorized by § 7601 will be frustrated in this class of cases. Settled principles of statutory interpretation require that we avoid such a result absent unambiguous directions from Congress" (*id.* at 150).

This case involves a variation of the process of identification by the Internal Revenue Service considered in *Bisceglia*. Here, the answer to the initial question sought by the Service in *Bisceglia*—the identity of the potential taxpayer—was known. Accordingly, the summons at issue was more conventionally styled "[i]n the matter of the tax liability of [respondent] Harvey F. Euge" (A. 13). During the investigation of respondent, the agent discovered the existence of 20 bank accounts with substantial balances bearing names on the signature cards other than that of respondent but addresses of properties owned by respondent. These facts, coupled with frequent transfers between the accounts and the use of a post office box in respondent's name for the receipt of the bank statements, suggested that respondent was maintaining bank accounts in false names for the purpose of concealing taxable income.

Hence, the unknown information that the agent sought to obtain was the identity of the holders

of the various bank accounts in order to ascertain whether their true owner was in fact respondent. The technique he sought to employ was to request respondent to execute for laboratory analysis on the standard Internal Revenue Service handwriting exemplar form the various signatures on the bank account cards. The court of appeals, however, held that the Internal Revenue Service does not have "the authority under the statute here involved to compel a taxpayer to create out of thin air handwriting exemplars by using his brain, eyes and hand" (Pet. App. B 9a n.3).

As we shall discuss in greater detail *infra*, we believe that the court of appeals' refusal to enforce an internal revenue summons requiring a taxpayer to appear before a special agent and to furnish handwriting exemplars has no basis in the language and structure of the Code, which invests broad powers in the Commissioner to make the inquiries necessary to enforce the revenue laws. Our point here is that the court's apparent confinement of the statutory summons power to the production of records already in existence would seriously undermine the Service's ability to insure that all federal taxes due are reported and paid.

While the enforcement program of the Internal Revenue Service includes routine audits based upon examination of filed tax returns, a fair administration of the law also requires other forms of scrutiny if sources of unreported income and its recipients are to be identified. In most instances, unreported income cannot be ascertained from an examination

of tax returns alone. Indeed, a large number of the recipients of such income (such as respondent) fail to file any tax return. As a result, the Service necessarily must rely on other investigative techniques in order to obtain information with respect to unreported income.

Because the usual type of transaction which is cleared through one or more banks yields documentary traces, tax evaders will often employ aliases in their dealings with financial institutions. The maintenance of an alias on a bank account has always suggested that the owner has not properly reported the deposits for federal tax purposes. Thus, the existence of 20 bank accounts bearing names other than respondent's but addresses that were linked to respondent, "gave the Service good reason, and, indeed, the duty to investigate." *United States* v. *Bisceglia, supra*, 420 U.S. at 152 (Blackmun, J., concurring). It was therefore amply justified in seeking from respondent handwriting exemplars for laboratory analysis in order to determine whether he was the true owner of the accounts. "The Service's suspicion as to possible liability was more than plausible. * * * The summons, in short, was issued pursuant to a genuine investigation" (*id.* at 152 (footnote omitted) Blackmun, J., concurring).

Bank accounts under aliases of the type presented in this case are but one area in which handwriting exemplar summonses are commonly issued by the Internal Revenue Service. We are advised by the Service that the most important current use for such

summonses is to determine the identities of persons who file multiple tax returns under false names claiming income tax refunds. This type of fraudulent activity poses a serious threat to the integrity of the tax collection system.[4]

There are other situations in which handwriting exemplars are a useful investigative tool. Persons in the possession of unreported cash income will often make disbursements by purchasing money orders under false names. Given the large volume of such transactions in the average bank, bank employees will not be able to identify positively a particular taxpayer as the purchaser of money orders. In such circumstances, the Service can most effectively determine whether a person under investigation purchased such money orders by means of handwriting exemplars. See *United States* v. *Campbell*, 524 F.2d 604 (8th Cir. 1975). Similarly, other persons engaged in evading taxes may issue false invoices to their businesses which they arrange to have paid and thereafter pocket the proceeds. Comparative handwriting analyses of the invoices and checks will yield evidence of this type of activity. See *United States* v. *Rosinsky*, 547 F.2d 249 (4th Cir. 1977). Hand-

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[4] In January 1977, the Internal Revenue Service instituted a Questionable Refund Program to deal with fraudulent refund schemes. Since the beginning of 1976, the Service has detected more than 8,900 questionable returns involving refund claims of $12.3 million. See Statement of Jerome Kurtz, Commissioner of Internal Revenue Before the Subcommittee on Commerce, Consumer, and Monetary Affairs of the House Committee on Government Operations (April 25, 1979).

writing exemplars can likewise be used to establish the authorship of gambling records and thereby fix liability for income and wagering taxes.

Finally, given the disparity between the tax rates applicable to married persons filing jointly and those filing separately (Compare Sections 1(a) with 1(d) of the Internal Revenue Code of 1954), it is not uncommon for one spouse to forge the signature of an estranged spouse in order to take advantage of the lower joint rates. The need for handwriting analysis arises when the spouse whose signature is forged objects to the imposition of joint liability for taxes due. See Section 6013 of the Code. Handwriting exemplars serve either to confirm or deny the existence of such activity. See *United States* v. *Brown*, 536 F.2d 117 (6th Cir. 1976).

In light of the foregoing, it is apparent that without the power to require the execution of handwriting exemplars, the Internal Revenue Service cannot effectively conduct investigations in cases where, as here, a determination of the identity of the author of documents is critical to the inquiry.[5] A constrictive

[5] As we pointed out in our petition (page 13 and note 3), we are advised by the Internal Revenue Service that handwriting exemplars have been used in the investigation of 320 cases during the 18-month period ending on December 6, 1978. In a number of these cases, handwriting exemplars were produced voluntarily.

The question whether the Internal Revenue Service may compel the execution of handwriting exemplars is producing an increasing amount of litigation. See *United States* v. *Ginsburg*, No. C 78-6028 (E.D. Ark. Jan. 8, 1979); *United States* v. *Lewis*, 42 A.F.T.R. 5821 (N.D. Tex. July 11, 1978); *United States* v. *Hoopingarner*, 438 F. Supp. 366 (N.D. N.Y. 1977); *United States* v. *Bassman*, 40 A.F.T.R.2d 5990 (S.D. Iowa Sept. 1, 1977).

interpretation of Section 7602, limiting the use of an internal revenue summons to the production of documents already in existence, would seriously hamper a wide variety of ordinary investigations into suspected tax abuse. We turn now to an examination of the statutory language, structure, and legislative history, all of which support the validity of a properly issued summons to compel the execution of handwriting exemplars.

B. In Light of Its Language, Structure and Legislative History, the Statutory Scheme for the Issuance of Internal Revenue Summonses Indicates That a Summons Is Authorized to Require a Person to Appear and Execute Handwriting Exemplars in Aid of a Tax Investigation

1. *The statutory language and structure*

a. Pursuant to Sections 7801(a) and 7802 of the Code, the Department of the Treasury, through the Commissioner of Internal Revenue, is charged with the "administration and enforcement" of the revenue laws. Consistent with this responsibility, the Commissioner is "authorized and required," by Section 6201(a), "to make the inquiries, determinations, and assessments of all taxes * * *." Once taxes are assessed, Section 6301 directs that the Commissioner "shall collect the taxes imposed by the internal revenue laws." Finally, in order that these statutory duties may be discharged effectively, Section 7601 em-

powers the Commissioner to "cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax * * *." This broad power to canvass and inquire is the basis of the Internal Revenue Service's ability to obtain much of the information vital to successful administration and enforcement of the tax law. For, as in any other area of law enforcement, the tax collecting authorities must be able to detect and investigate suspicious activities of particular persons who may be liable for additional taxes. Fair and effective administration of our self-reporting tax system requires that the Internal Revenue Service be able to identify those persons who may owe additional taxes.

That Section 7601 immediately precedes the provision authorizing the Internal Revenue Service to issue summonses is not without significance. Indeed, this Court in *Donaldson* v. *United States, supra,* 400 U.S. at 523, recognized the close relationship between the two provisions by including Section 7601 in what it described as "the statutory structure that Congress has provided for the issuance and enforcement of an internal revenue summons." See also *Tillotson* v. *Boughner*, 333 F.2d 515 (7th Cir.), certiorari denied, 379 U.S. 913 (1964); *De Masters* v. *Arend*, 313 F.2d 79, 86-87 (9th Cir. 1963). Such summonses are thus one method available to the Service to discharge its affirmative and far-reaching duty under

Section 7601 to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax." Nothing in the statutory phrase "inquire after and concerning all persons" suggests that the Service would not be authorized to require a person under investigation to display for examination certain physical characteristics such as handwriting or voice exemplars or to make any other constitutionally permissible forms of disclosure. To the contrary, the statutory command of Section 7601 requires the Internal Revenue Service to pursue every fruitful line of inquiry that might uncover those persons liable for additional taxes. There is no reason, we submit, to conclude that while the Service is empowered, and indeed admonished, by Congress to discover the identity of potential taxpayers, it cannot do so by using the basic investigative tool furnished it by Congress—the Internal Revenue Summons—to determine the identity of the author of documents where that fact is critical to the inquiry.

b. The language of Section 7602 is consistent with the existence of statutory authority for the issuance of a summons requiring a person to appear and execute handwriting exemplars. Production of such evidence is firmly grounded in the statutory purposes for the issuance of summonses. Section 7602 of the Code empowers the Commissioner to issue summonses in aid of four broad purposes: (1) ascertaining the correctness of any return; (2) making a return where none has been made; (3) determining the liability of any person for any internal revenue tax;

and (4) collecting any such liability. The summons served upon respondent falls well within these statutory purposes. Respondent had not filed a return for any of the years under investigation and the Service sought to reconstruct his income by means of the bank deposits method. Hence, ascertainment of all of respondent's bank accounts, including those that he may have maintained under aliases, was critical to the investigation. Once the handwriting exemplars linked respondent to the 20 bank accounts that bore his address, the Commissioner could reconstruct his income and make such returns under the second statutory purpose. See also Section 6020 of the Code. The inquiry would also encompass, in accordance with the third and fourth statutory purposes, a determination of respondent's liability for additional taxes with respect to his bank deposits and, if such taxes are owed, their collection.

The close connection between the summons at issue and the statutory purposes is reinforced by the operative terms of Section 7602. They likewise support our submission that the Internal Revenue Service is authorized to issue a summons requiring a person to appear and execute handwriting exemplars. Section 7602(2) speaks of summoning persons "to appear before the Secretary * * * and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry * * *." Section 7602(3) authorizes the Secretary "To take such testimony of the person concerned, under oath, as may be relevant or material to

such inquiry." The compulsory process authority to require a person "to appear * * * and to give such testimony * * * as may be relevant" reasonably carries with it the power to compel a witness to exhibit specific physical characteristics such as handwriting or voice exemplars. As a noted commentator has written, "The testimonial duty * * * includes every form of disclosure which may assist in the ascertainment of the truth. It is not confined to utterances of the voice. It extends to documents. * * * It extends also to the *human body* and to *chattels* and *premises* possessed." 8 J. Wigmore, *Evidence*, § 2216(8) (McNaughton rev. 1961) (emphasis in original).

These observations of Professor Wigmore are consistent with this Court's statement in *United States* v. *Nixon*, 418 U.S. 683, 709 (1974), that "The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." In *Nixon*, the Court reaffirmed the principle that " 'the public * * * has a right to every man's evidence,' except for those persons protected by a constitutional, common law, or statutory privilege * * *" *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972).

In keeping with the general policy favoring a broad interpretation of compulsory process authority, the

courts have consistently ruled that requiring the execution of handwriting exemplars is an inherent element of the power to compel a witness to appear and give testimony. Indeed, the power to compel appearance and testimony would be virtually meaningless if the witness could not be required to provide whatever evidence was not protected by a constitutional or common law privilege. For example, a court has the power on pain of contempt to compel the execution of handwriting exemplars from a person required to appear before it. See, *e.g.*, *Lewis* v. *United States*, 382 F.2d 817 (D.C. Cir. 1967). Similarly, police officers can compel the execution of such exemplars from persons within their lawful custody. See, *e.g.*, *United States* v. *Rudy*, 429 F.2d 993 (9th Cir. 1970); *United States* v. *McNeal*, 463 F.2d 1180, 1181 (5th Cir. 1972).

So here, once it is recognized that the Service had the authority to compel respondent to appear and to give testimony, it follows that it also had the power to require him to provide exemplars of his handwriting.[6] If the statute empowers the Service to compel testimony that is not protected by a constitutional or common law privilege, surely it author-

[6] In an early internal revenue summons enforcement case involving documents arising under an antecedent provision which allowed the summoning of a third party only for purposes of taking his testimony, the court below ruled that "This testimonial duty to attend and disclose applies equally to the production of documents; and the process for documents will be implied whenever testimonial compulsion in general is predicated by a statute." *Brownson* v. *United States*, 32 F.2d 844, 847 (8th Cir. 1929).

izes the execution of handwriting exemplars, which this Court has held to be the display of "an identifying physical characteristic outside [the] protection [of the Fifth Amendment]" (*Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967)), and an act that violates "no legitimate Fourth Amendment interest" (*United States* v. *Mara*, 410 U.S. 19, 22 (1973)). See pages 38-39, *infra*. The testimonial duty imposed by the statute necessarily includes the compelled disclosure of every type of nonprivileged evidence that is relevant to a legitimate tax investigation. As the Fourth Circuit concluded in *United States* v. *Rosinsky*, 547 F.2d 249, 252 (1977), "The authority thus given [in Section 7602(2)] to require the witness to appear impliedly carries with it the power to require certain nontestimonial acts on the part of the witness such as providing handwriting or voice exemplars. This follows from the analogy under § 7602 to a grand jury subpoena."

There is, in sum, no reason to read the broad statutory grant of the summons authority, which extends to the compulsion of testimonial utterances (subject, of course, to proper claims of the privilege against self-incrimination), as not similarly embracing nontestimonial displays of physical characteristics such as handwriting—which are not subject to the privilege and are properly regarded as an inherent aspect of the explicitly granted authority to compel a person's appearance.

c. While we believe that the authority to compel appearance and testimony is sufficient to encompass

nonprivileged disclosures such as the handwriting exemplars at issue here, the fact that Section 7602 (2) authorizes the summoning of "books, papers, records, or *other data*" lends further support to the proposition that the execution of handwriting exemplars is within the scope of the Service's compulsory process. The common understanding of the phrase "other data" in this context is other "detailed information of any kind" or "material for an investigation * * *". See *Webster's Third New International Dictionary* 577 (1976 ed.); *Funk & Wagnalls New Standard Dictionary* 655 (1947 ed.). Surely the handwriting exemplars at issue here fit within the broad category of "information of any kind" or "material for an investigation" since they will provide factual evidence tending either to confirm or to deny the inference that arose during the Service's investigation that respondent maintained 20 bank accounts under assumed names. Accord: *United States* v. *Rosinsky*, *supra*, 547 F.2d at 253 n.3. Indeed, similar statutory language vesting the district courts with power to order the confinement of witnesses who refuse to obey orders "to testify or provide other information, including any book, paper, document, record, recording, or other material" (28 U.S.C. 1826 (a)) has been held to be sufficiently broad to include handwriting exemplars. *Palmer* v. *United States*, 530 F.2d 787 (8th Cir. 1976); *In re Lopreato*, 511 F.2d 1150, 1153-1154 (1st Cir. 1975).

Contrary to the views stated in *United States* v. *Brown*, 536 F.2d 117, inclusion of handwriting exemplars within the phrase "other data" does not offend the doctrine of statutory construction, ejusdem generis. Literally, ejusdem generis means of the same kind, class, or nature (*Black's Law Dictionary* 608 (4th ed. 1968). As this Court observed more than 40 years ago in *Gooch* v. *United States*, 297 U.S. 124, 128 (1936), "The rule of ejusdem generis, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation." See also *United States* v. *Powell*, 423 U.S. 87, 91 (1975). Here, the obvious purpose of Section 7602 is to permit the Commissioner to pursue "the broad inquiry authorized by § 7601" (*United States* v. *Bisceglia*, *supra*, 420 U.S. at 150) to "inquire after and concerning all persons * * * who may be liable to pay any internal revenue tax * * *." Absent a specific direction from Congress, there is no reason to exclude handwriting exemplars from the statutory catalogue of evidence subject to the summons power, when such evidence is essential to determine the authorship of documents—a question that can be central to the very inquiry authorized by the statute.

At all events, this Court has cautioned that the doctrine of ejusdem generis cannot be employed to "render general words meaningless;" it therefore

has no application where the "specific words are sufficiently comprehensive to exhaust the genus and leave nothing essentially similar upon which the general words may operate." *Mason* v. *United States*, 260 U.S. 545, 554 (1923). Accord: *United States* v. *Alpers*, 338 U.S. 680, 682 (1950). Here, the genus of documentary evidence already in existence is exhausted by the phrase "books, papers, [and] records." There would therefore have been no reason for Congress to have added the general term "other data" if it were merely confined to the class of "books, papers and records."[7] Hence, the general phrase "other data" in Section 7602 necessarily connotes

[7] In holding that the Service's summon's authority does not extend to handwriting exemplars, the Sixth Circuit in *Brown* relied upon the legislative history of Section 507 of the Revenue Act of 1934, ch. 277, 48 Stat. 680, 757. It concluded that Congress substituted the phrase "other data" for "memoranda" in order to authorize the Service to examine previously unavailable documents belonging to the transferors of property of a liquidated corporation to determine possible transferee liability (see 536 F.2d at 122).

But Congress made no such verbal substitution in the text of the statute. As enacted, Section 507 spoke of "books, papers, records, or memoranda bearing upon such liability." While the committee report explains that the provision was designed to give the Commissioner "the right to examine books, records, and other data to ascertain the liability of transferees of property * * *" (S. Rep. No. 558, 73d Cong., 2d Sess. 623 (1934)), the term "other data" was there employed merely as a shorthand expression to avoid setting forth the complete enumeration in the statute. The statutory text does not support the Sixth Circuit's view that the phrase "other data" is limited to specific cases of transferee liability or the inference that "other data" is equivalent to "memoranda." See page 47, note 17, *infra*.

the broad range of other information material to the investigation that is within the ability of the summoned party to produce.

Finally, there is no basis for the Sixth Circuit's view in *Brown* that the Service's summons authority does not extend to material that has "to be created for the examination" (536 F.2d at 122). See also *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976). To begin with, the power to summon persons "to give such testimony, under oath, as may be relevant or material to such inquiry" reasonably includes the production of information or explanatory material in response to specific questions posed by a revenue agent even though such evidence may not previously have been reduced to written form. Indeed, in connection with the Internal Revenue Service's enforcement program against tax return preparers, the courts have uniformly enforced summonses seeking lists of the identities of clients without regard to whether such summaries had been in existence prior to the issuance of the summonses. See, *e.g.*, *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *United States* v. *Turner*, 480 F.2d 272 (7th Cir. 1973); *United States* v. *Berkowitz*, 488 F.2d 1235 (3d Cir. 1973), cert. denied, 421 U.S. 946 (1975); and *United States* v. *Carter*, 489 F.2d 413 (5th Cir. 1973).

Moreover, a handwriting exemplar is merely the exhibition of an "identifying physical characteristic" of the witness. *Gilbert* v. *California*, *supra*, 388 U.S. at 266-267. As such, it is always in existence;

the only creation involved is its recordation in permanent form for purposes of further study. In this respect, it is analogous to the taking of fingerprints or a photograph of a person under investigation or the required display of his person before an eyewitness for purposes of identification.[8] If, as we submit, such techniques of identification are within the scope of the Service's summons power, the handwriting exemplars are likewise subject to compelled execution.

d. Without addressing the statutory language and structure discussed above, the en banc court ruled that the Internal Revenue Service has no authority to issue a summons compelling the execution of handwriting exemplars. In so holding, the court overruled its prior decision in *United States* v. *Campbell, supra,* stating that "the view expressed in the dissenting opinion in *Campbell* is the preferable one and should be followed in this case and in the future unless the Supreme Court holds otherwise or unless Congress changes the law" (footnote omitted) (Pet. App. B 9a).

But the dissent in *Campbell* was based on the erroneous premise that a summons requiring handwriting exemplars is a search and seizure within the meaning of the Fourth Amendment. As this Court

[8] For example, if a bank official could have identified respondent as the owner of a particular account held under an assumed name, there is little doubt that the Service could have exercised its summons authority to compel respondent to appear so that the bank official could have identified him. The handwriting exemplars at issue here are comparable.

made clear in *United States* v. *Dionisio,* 410 U.S. 1 (1973), and *United States* v. *Mara, supra,* a grand jury subpoena requiring appearance is not a seizure within the meaning of the Fourth Amendment and that Amendment is not violated by a directive compelling production of "physical characteristics" that "are constantly exposed to the public" (410 U.S. at 9, 14) such as voice or handwriting exemplars. In so holding, the Court observed that the requirement that a witness exhibit such physical characteristics rested upon "the historically grounded obligation of every person to appear and give his evidence before the grand jury" (*id.* at 9-10). "Handwriting, like speech, is repeatedly shown to the public, and there is no more expectation of privacy in the physical characteristics of a person's script than there is in the tone of his voice" (*id.* at 21). The Court therefore held in *Mara* that "[t]he specific and narrowly drawn directive requiring the witness to furnish a specimen of his handwriting violated no legitimate Fourth Amendment interest" (*id.* at 22; footnote omitted.)[9]

[9] Nor does the required production of handwriting exemplars violate the Fifth Amendment privilege against compulsory self-incrimination. While "[o]ne's voice and handwriting are, of course, a means of communication," the Court has held that a "mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside * * * [the] protection [of the Fifth Amendment]" *Gilbert* v. *California, supra,* 388 U.S. at 266-267 (1967). See also *United States* v. *Dionisio, supra,* 410 U.S. at 5-6.

Given the analogy between the grand jury subpoena and the internal revenue summons (see pages 19-20, *supra*), there is no basis for the rejection by the dissent in *Campbell* of the precedential force of *Mara* and *Dionisio* to the question presented in the instant case. The dissenting judge in *Campbell* stated that the analogy was "unconvincing" because "[t]here is no direct supervision of an Internal Revenue Service investigation by a judge or other neutral judicial officer as there is of a grand jury" (524 F.2d at 609).[10]

But just as a grand jury subpoena can be enforced only by a court, the Internal Revenue Service can compel compliance with its summonses only by invoking the jurisdiction of the federal district court in "'an adversary proceeding affording the opportunity for challenge and complete protection to the witness.'" *Donaldson* v. *United States*, *supra*, 400 U.S. at 525. See 26 U.S.C. 7604(a). Moreover, the rules set forth in this Court's decisions in *United States* v. *Powell*, *supra*; *Donaldson* v. *United States*, *supra*; and most recently in *United States* v. *La-*

[10] The dissent in *Campbell* also erroneously assumed that "The Internal Revenue Service, upon finding a violation of the law, is the same body which undertakes the prosecution of the taxpayer involved" (524 F.2d at 609). From this premise, it argued that "[t]hose charged with investigative and prosecutorial duties should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks" (*ibid.*). It is, of course, the Department of Justice—not the Internal Revenue Service—that is responsible for the conduct of criminal tax prosecutions. See *United States* v. *LaSalle National Bank*, *supra*, 437 U.S. at 312.

Salle National Bank, *supra*, for enforcement of an IRS summons, eliminate the possibility of abuse of this vital investigative tool.[11] The analogy between the grand jury subpoena and the internal revenue summons, reaffirmed by this Court in *Bisceglia*, is therefore sound. In both cases, "Congress has provided protection from arbitrary or capricious action by placing the federal courts between the Government and the person summoned." *United States* v. *Bisceglia*, *supra*, 420 U.S. at 151. The constitutional concerns evinced by the court below with respect to summoned production of handwriting exemplars are accordingly groundless.

[11] In support of its view that the Service's summons authority in Section 7602(2) should be "strictly construed" (524 F.2d at 608), the dissent in *Campbell* relied upon *United States* v. *Powell*, *supra*, 379 U.S. 48; and *Jones* v. *SEC*, 298 U.S. 1 (1936). But neither case stands for such a proposition. In *Powell*, the question presented was whether, after the normal three-year civil statute of limitations expired, the Service could issue a summons without establishing probable cause for believing that fraud had been committed. This Court rejected the application of a probable cause standard, holding that the Service could exercise its summons authority in the same manner as the grand jury, "merely on suspicion that the law is being violated, or even just because it wants assurance that it is not," quoting from *United States* v. *Morton Salt Co.*, 338 U.S. 632, 642-643 (1950) (379 U.S. at 57). *Powell* therefore supports the broad construction of the Service's summons authority that we urge here.

Jones v. *SEC*, *supra*, is likewise inapposite. There, the Court held that once an issuer formally withdrew its registration statement before it became effective, the SEC no longer had the statutory authority to subpoena its books and records.

2. *The legislative history*

The foregoing analysis of the statutory text as authorizing the issuance of internal revenue summonses for handwriting exemplars is also supported by the pertinent legislative history. At the time of the 1954 codification of the tax law, the report of the House Ways and Means Committee stated that the revisions of the procedural and administrative provisions "represent[ed] a substantial simplification" under which "it has been possible to combine a great number of provisions, shortening them and providing more uniform application for the various internal revenue taxes." H.R. Rep. No. 1337, 83d Cong., 2d Sess. 99 (1954). See also S. Rep. No. 1622, 83d Cong., 2d Sess. 133 (1954); 100 Cong. Rec. 3425 (1954). Specifically, the legislative history of Section 7602, the summons power, shows that Congress intended "no material change from existing law." H.R. Rep. No. 1337, *supra*, at A436; S. Rep. No. 1622, *supra*, at 617. Thus, an understanding of the scope of the earlier provisions governing the power of the Internal Revenue Service to canvass and to issue summonses is essential to any appraisal of the breadth of the present statutory structure.

As the Court noted in *Donaldson* v. *United States*, *supra*, 400 U.S. at 523-524, the duty of the Internal Revenue Service to canvass and to inquire derives from Section 3172 of the Revised Statutes of 1874. Similarly, the summons power, presently set forth in Section 7602 of the 1954 Code, also is rooted in

statutes enacted more than a century ago.[12] The legislative history of Section 7602 shows that the summons power was derived from three separate provisions, *viz.*, Sections 3614, 3615(a)-(c), and 3654 of the Internal Revenue Code of 1939.[13] While the first of these statutes originally appeared in 1919, the latter two had independent roots in Revenue Acts dating back to 1864. Each of these statutes confirms the existence of the power to compel the appearance and testimony of persons, as well as the production of every type of constitutionally permissible evidence, that might uncover unpaid tax liabilities.

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[12] Because the 1939 Code also was intended merely to codify existing law with no attempt to effect substantive changes (see, e.g., S. Rep. No. 20, 76th Cong., 1st Sess. 1 (1939)), earlier Revenue Acts must be examined in order to ascertain the meaning of specific provisions of that codification.

[13] See Table II of the 1954 Code, 68A Stat. 969, which notes that Sections 3614 and 3615(a)-(c) of the 1939 Code were essentially carried forward into Section 7602 of the 1954 Code. See also *Donaldson* v. *United States*, *supra*, 400 U.S. at 535, referring to Section 7602 as having "ascertainable roots" in Sections 3614(a) and 3615(a)-(c) of the 1939 Code. Although Table II does not contain any reference to Section 3654(a) of the 1939 Code, the inclusion of the summons power in that provision, coupled with the committee reports' statements that Congress intended no material change in existing law, strongly suggests that an examination of Section 3654(a) of the 1939 Code is necessary as an aid to understanding the current scope of the summons power. See Section 7806(b) of the 1954 Code. Moreover, the close "proximity" of Section 3654 to Sections 3614 and 3615, as the Court noted in *Donaldson* (*ibid.*), makes Section 3654 highly relevant in any consideration of the summons authority.

The first part of "existing law" before the adoption of Section 7602 in the 1954 Code, appeared in Section 3614(a) of the 1939 Code, which provided in part as follows:

> *To determine liability of the taxpayer.* The Commissioner, for the purpose of ascertaining the correctness of any return, or for the purpose of making a return where none has been made, is authorized, by any officer or employee of the Bureau of Internal Revenue, including the field service, designated by him for that purpose, to examine any books, papers, records, or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or of any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take his testimony with reference to the matter required by law to be included in such return, with power to administer oaths to such person or persons.

The Commissioner was first given the power to examine records and compel attendance of witnesses and take testimony in 1919 through the enactment of a virtually identical provision. Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1142, Section 1305.[14]

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[14] Neither the committee reports nor the congressional debates contain any reference to the meaning of the 1919 provision.

The 1919 provision was reenacted several times before becoming part of the 1939 Code. Act of November 23, 1921, ch. 136, 42 Stat. 227, 310, Section 1308; Act of June 2, 1924, ch. 234, 43 Stat. 253, 340, Section 1004; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 113, Section 1104; Act of May 29, 1928, ch. 852, 45 Stat. 791, 878, Section 618.

The second part of the "existing law" carried forward in Section 7602 was contained in Section 3615 of the 1939 Code, which granted a summons power to the collectors by providing in pertinent part as follows:

> (a) *General authority.* It shall be lawful for the collector, subject to the provisions of this section to summon any person to appear before him and produce books at a time and place named in the summons, and to give testimony or answer interrogatories, under oath, respecting any objects or income liable to tax or the returns thereof. * * *

This section closely follows a provision first adopted in 1864, Act of June 30, 1864, ch. 173, 13 Stat. 223, 226, Section 14,[15] and reenacted several times prior to its codification in 1939.[16]

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[15] There were no committee reports on the 1864 Act.

[16] Act of July 13, 1866, ch. 184, 14 Stat. 98, 101, Section 9; Act of December 24, 1872, ch. 13, 17 Stat. 401, Section 1. In 1873 the provision was codified as part of Section 3173 of the Revised Statutes, which section was amended by Act of March 1, 1879, ch. 125, 20 Stat. 327, 330-331, Section 3; Act of August 27, 1894, ch. 16, 28 Stat. 509 557-559, Section 34; Act of October 3, 1913, ch. 16, 38 Stat. 114, 177-179; Subsec. I; Act of September 8, 1916, ch. 463, 39 Stat. 756, 773-774, Section 16; Act of February 24, 1919, ch. 18, 40 Stat. 1057, 1146-1147, Section 1317; Act of November 23, 1921, ch. 136, 42 Stat. 227, 311-312, Section 1311; Act of June 2, 1924, ch. 234, 43 Stat. 253, 344-346, Section 1018; Act of February 26, 1926, ch. 27, 44 Stat. (Part 2) 9, 117-118, Section 1115.

Finally, the third part of the "existing law" carried forward in Section 7602 of the 1954 Code is derived from Section 3654(a) of the 1939 Code, which provided as follows:

> SEC. 3654. GENERAL POWERS AND DUTIES RELATING TO COLLECTION.
>
> (a) *Collectors.*—Every collector within his collection district shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615.

This section was derived from an essentially identical provision first enacted in 1868, Act of July 20, 1868, ch. 186, 15 Stat. 125, 144, Section 49, and codified as part of Section 3163 of the Revised Statutes of 1874.

Thus, by combining Sections 3614, 3615 and 3654 into Section 7602 in 1954 without intending to change existing law, Congress continued to sanction the use of an internal revenue summons to compel the appearance and testimony of all persons who could further an investigation leading to the discovery of all those who may be liable for unpaid taxes. Like

Section 7602, all of these prior provisions cast the summons power in the broadest possible manner using terms such as "books, papers, records, or memoranda," "require the attendance of any * * * person having knowledge on the premises," "to summon any person to appear * * * to give testimony or answer interrogatories," "to examine all persons, books, papers, accounts, and premises."[17] Moreover, the expansive scope of Section 3654 of the 1939 Code, granting to the collectors the power to issue summonses for any purpose relating to their duty to oversee the faithful execution of internal revenue laws and to aid in the "prevention, detection, and punishment of any frauds," strongly supports a reading of Section 7602 as empowering the Service to discharge fully its affirmative and wide-ranging duty under Section 7601 to canvass and to inquire. Thus, the history, as well

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[17] In *Brown*, the Sixth Circuit relied on the legislative history of the 1954 Code that Congress intended no significant change in the summons power to buttress its conclusion that the phrase "other data" in Section 7602 of the 1954 Code was equivalent to the term "memoranda" in Section 3614 of the 1939 Code (see 536 F.2d at 122). But the focus of its analysis of the legislative history is too narrow. In holding that the summons power did not extend to handwriting exemplars, the court overlooked the other statutory antecedents of Section 7602 described above (see Section 3615(a) and 3654(a)) that respectively confer the authority "to summon any person * * * to give testimony or answer interrogatories" and "to examine all persons * * *." It is this aspect of the legislative history that confirms the Commissioner's broad power to compel the production of all constitutionally permissible evidence, including the handwriting exemplars at issue here.

as the text of both the current provision and its authoritative predecessors tends to refute, rather than support, the distinction made by the decision below, between a summons to compel the display of physical characteristics and one seeking production of documents already in existence (see Pet. App. B 9a, n.3). The legislative history is consistent with the general principle, which we urge here, that the Internal Revenue Service's summons authority encompasses every type of constitutionally permissible evidence, including handwriting exemplars.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

LAWRENCE G. WALLACE
Acting Solicitor General *

M. CARR FERGUSON
Assistant Attorney General

STUART A. SMITH
Assistant to the Solicitor General

ROBERT E. LINDSAY
CARLETON D. POWELL
DANIEL F. ROSS
Attorneys

JULY 1979

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* The Solicitor General is disqualified in this case.

APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 7601. CANVASS OF DISTRICTS FOR TAXABLE PERSONS AND OBJECTS.

(a) *General Rule.*—The Secretary shall, to the extent he deems it practicable, cause officers or employees of the Treasury Department to proceed, from time to time, through each internal revenue district and inquire after and concerning all persons therein who may be liable to pay any internal revenue tax, and all persons owning or having the care and management of any objects with respect to which any tax is imposed.

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax

or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

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